A **YEE WENG KAI**

v.

YAM KONG SENG & ANOR

B COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-2935-2010]
C 30 JANUARY 2012

LIMITATION: *Acknowledgement of debt - Requirements of acknowledgement - Whether short messaging service constituted valid acknowledgement - Whether complied with requirements of ss. 26(2) and*
D *27(1) Limitation Act 1953 - Whether action barred by limitation - Limitation Act 1953, s. 6(1)*

COMPANY LAW: *Directors - Liability - Whether director personally liable for amount owed by company - Whether director was purely acting*
E *for and on behalf of company - Whether court allowed to lift veil of incorporation - Whether there was justification to pierce corporate veil*

The respondents/plaintiffs ('the respondents') had engaged the first defendant to build a factory on a piece of land through its director, the appellant (the second defendant in the High Court).
F The respondents claimed that they had placed certain amounts of monies in the name of the first defendant to be withdrawn for progress payments for the construction of the factory. Upon the completion of the factory, the respondents asked for the refund of the outstanding sum of RM589,055.61. The respondents were
G successful in the High Court and hence this appeal by the appellant. The issues raised by the appellant were, *inter alia*: (i) that the respondents' action was barred by limitation; and (ii) the appellant, as an officer or a director of the first defendant company, could not be held liable for the debt or liability of the
H first defendant. In support of the first ground, the appellant contended that the cause of action first arose either on 7 July 1999, when the factory was completed, or 17 December 1999, when the first defendant issued a letter together with the statement of account. The respondents' writ and statement of
I claim was filed on 7 March 2008 *ie*, eight years and three months later, which was clearly outside the prescribed period of six years under s. 6(1) of the Limitation Act 1953 ('the Act'). However,

the learned trial judge concluded that the short messaging service ('SMS') sent by the appellant to the respondents, on 5 September 2006, amounted to acknowledgement of the debt and therefore time started to run afresh from that date.

Held (allowing appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) Section 26(2) of the Act provides that the right of action in cases where the debtor acknowledges the claim or make any payment in respect thereof shall be deemed to have accrued on and not before the date of the acknowledgement. In order to constitute a valid acknowledgement under s. 26(2), there must be evidence to show that there was unequivocal admission of a subsisting debt by the defendant at the time of the acknowledgement. (paras 10 & 17)

(2) On the facts, the SMS was not an unequivocal admission of a subsisting debt as it did not quantify the debt in figures nor was it capable of ascertainment by calculation or by extrinsic evidence without further agreement between the parties. Further, the said SMS was ambiguous and unclear. It referred to the "loan repayment" which was not the pleaded case of the respondents. (para 18)

(3) Section 27 of the Act provides that the acknowledgement must be in writing and duly signed by the person making it. Oral representations which are not in writing, and hence not signed by the person making it, do not amount to valid acknowledgement under s. 27(1) of the Act. (paras 12 & 13)

(4) The SMS, being an electronic short message, could not be considered to be in writing and was not signed as required under s. 27(1) of the Act. Although it came from the appellant's handphone, it did not necessarily mean that it was the appellant who actually made or wrote the message. Therefore, the requirements under s. 27 of the Act were not fulfilled and therefore the said SMS could not in law amount to a valid acknowledgement of the debt claimed by the respondents. In the circumstances, the respondents' action had clearly exceeded the six year period as stipulated under s. 6(1) of the Act and was therefore time-barred. (para 19)

(5) In the instant case, there was no evidence, either in the form of document or otherwise, adduced during trial to show that the appellant had held himself out to be personally liable for the amount claimed by the respondents. The liability to refund or to repay the amount claimed by the respondents lied with the first defendant company, and not with the appellant who was dealing with the respondents purely "acting for and on behalf of the first defendant at all material times" as admitted by the respondents in their statement of claim. (paras 20 & 27)

(6) In attaching liability to the appellant, the learned High Court Judge was trying to pierce the corporate veil and held the appellant personally liable for the actions of the first defendant company. In order to validly pierce the corporate veil, there must be sufficient justification or special circumstances in order to do justice. The respondents must lay sufficient evidential foundation to support the plea of lifting the corporate veil. In the instant case, fraud was never a pleaded issue nor was there evidence of fraud ever adduced by any party during the trial. Neither was there anything to indicate that the first defendant company was a mere facade concealing the true fact of the transactions. Therefore, this was not an appropriate case for the court to lift the corporate veil and to attach liability to the appellant in relation to actions or debts by the first defendant company. (paras 28 & 30)

(7) The learned judge did not address the issue of how the appellant was liable for the monies placed with the first defendant company in the name of the first defendant and for the purpose of progress payment payable to the first defendant. The mere fact that the appellant had sent an SMS could not in law constitute a legal liability on him, without any valid cause of action in law being disclosed against him. The respondents had failed to disclose and to establish a valid cause of action against the appellant. The failure was fatal to the respondents' case against the appellant. (para 32)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden/plaintif-plaintif ('responden-responden) telah melantik defendan pertama untuk membina sebuah kilang di atas sebidang tanah melalui pengarahnya, perayu (defendan kedua di Mahkamah Tinggi). Responden-responden menyatakan bahawa mereka telah memasukkan wang di bawah nama defendan pertama untuk dikeluarkan sebagai bayaran progresif bagi pembinaan kilang tersebut. Setelah kilang tersebut siap dibina, responden-responden meminta pemulangan baki jumlah sebanyak RM589,055.61. Responden-responden berjaya di Mahkamah Tinggi dan maka itu, rayuan ini oleh perayu. Isu-isu yang dibangkitkan oleh perayu adalah, antara lain: (i) bahawa tindakan responden-responden dihadkan oleh masa; dan (ii) perayu, sebagai pegawai atau pengarah syarikat defendan pertama, tidak boleh diputuskan sebagai bertanggungjawab terhadap hutang atau liabiliti defendan pertama. Sebagai menyokong alasan pertama, perayu menghujahkan bahawa kausa tindakan mula-mula timbul sama ada pada 7 Julai 1999, apabila kilang tersebut disiapkan, atau 17 Disember 1999, apabila defendan pertama mengeluarkan sepucuk surat bersama-sama dengan penyata akaun. Writ dan penyata tuntutan responden-responden difailkan pada 7 Mac 2008 iaitu lapan tahun dan tiga bulan kemudian, yang mana jelas di luar tempoh masa enam tahun yang ditetapkan di bawah s. 6(1) Akta Had Masa 1953 ('Akta'). Walau bagaimanapun, yang arif hakim bicara memutuskan bahawa perkhidmatan pesanan ringkas ('SMS') yang dihantar oleh perayu kepada responden-responden, pada 5 September 2006, membentuk perakuan hutang dan dengan itu masa bermula semula dari tarikh tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 26(2) Akta memperuntukkan bahawa hak tindakan dalam kes-kes di mana penghutang mengakui tuntutan atau membuat apa-apa bayaran yang berkaitan akan dianggap bermula pada dan bukan sebelum tarikh perakuan tersebut. Untuk membentuk perakuan yang sah di bawah s. 26(2), perlu ada keterangan yang menunjukkan bahawa terdapat perakuan yang jelas terhadap hutang semasa oleh defendan pada masa perakuan tersebut dibuat.

(2) Berdasarkan fakta, SMS tersebut bukanlah pengakuan yang jelas terhadap hutang semasa kerana ia tidak menyatakan hutang dalam bentuk angka dan ia juga tidak boleh ditentukan melalui pengiraan atau keterangan luar tanpa persetujuan lanjut antara pihak-pihak. Selanjutnya, SMS tersebut adalah kabur dan tidak jelas. Ia merujuk kepada "pembayaran balik pinjaman" yang bukan merupakan kes yang diplidkan oleh responden-responden.

(3) Seksyen 27 Akta memperuntukkan bahawa perakuan tersebut mestilah dalam bentuk tulisan dan ditandatangani oleh orang yang membuatnya. Representasi lisan yang bukan dalam bentuk tulisan, dan dengan itu tidak ditandatangani oleh orang yang membuatnya, tidak membentuk perakuan yang sah di bawah s. 27(1) Akta.

(4) SMS, yang merupakan pesanan ringkas elektronik, tidak boleh dianggap sebagai berbentuk tulisan dan tidak ditandatangani seperti yang diperuntukkan oleh s. 27(1) Akta. Walaupun ia dihantar melalui telefon bimbit perayu, ia tidak semestinya bermaksud bahawa perayu yang sebenarnya telah membuat atau menulis pesanan tersebut. Oleh itu, keperluan di bawah s. 27 Akta tidak dipenuhi dan dengan itu SMS tersebut tidak boleh, dari segi undang-undang, membentuk perakuan sah hutang yang dituntut oleh responden-responden. Dalam hal keadaan sedemikian, tindakan responden-responden dengan jelas melangkaui tempoh masa enam tahun yang dinyatakan di bawah s. 6(1) Akta dan dengan itu dihadkan oleh masa.

(5) Dalam kes ini, tidak ada keterangan, sama ada dalam bentuk dokumen atau sebaliknya, yang dikemukakan semasa perbicaraan, untuk menunjukkan bahawa perayu telah mengakui dirinya bertanggungjawab secara peribadi bagi jumlah yang dituntut oleh responden-responden. Tanggungjawab untuk mengembalikan atau membayar semula jumlah yang dituntut oleh responden-responden terletak pada syarikat defendan pertama, dan bukan pada perayu yang berurusan dengan responden-responden yang hanya "bertindak bagi dan atas pihak defendan pertama pada kesemua masa material" seperti yang diakui oleh responden-responden dalam penyata tuntutan mereka.

(6) Dalam mengenakan tanggungjawab kepada perayu, Yang Arif Hakim Mahkamah Tinggi cuba untuk menembusi tabir korporat dan memutuskan bahawa perayu bertanggungjawab secara peribadi bagi tindakan-tindakan syarikat defendan pertama. Untuk menembusi tabir korporat secara sah, perlu wujud justifikasi yang secukupnya atau hal keadaan yang istimewa untuk berlaku adil. Responden-responden perlu mengemukakan asas keterangan yang secukupnya untuk menyokong pli penyingkapan tabir korporat. Dalam kes ini, fraud bukan isu yang diplidkan dan juga tidak ada keterangan berkaitan fraud yang dikemukakan oleh mana-mana pihak semasa perbicaraan. Juga tidak ada apa-apa untuk menunjukkan bahawa syarikat defendan pertama adalah *facade* semata-mata yang menyembunyikan fakta sebenar transaksi tersebut. Oleh itu, ini bukanlah kes yang wajar untuk mahkamah menyingkap tabir korporat dan mengenakan tanggungjawab kepada perayu berkaitan dengan tindakan-tindakan atau hutang oleh syarikat defendan pertama.

(7) Yang arif hakim tidak menjawab isu bagaimana perayu bertanggungjawab terhadap wang yang diletakkan dengan syarikat defendan pertama dalam nama defendan pertama dan bagi tujuan bayaran kemajuan yang kena dibayar kepada defendan pertama. Fakta semata-mata bahawa perayu telah menghantar SMS tidak boleh, di bawah undang-undang, membentuk tanggungjawab undang-undang terhadapnya, tanpa apa-apa kausa tindakan yang sah di sisi undang-undang didedahkan terhadapnya. Responden-responden telah gagal mendedahkan dan membuktikan kausa tindakan sah terhadap perayu. Kegagalan tersebut menjejaskan kes responden-responden terhadap perayu.

Case(s) referred to:

Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd [1997] 4 CLJ 437 CA ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

Good v. Parry [1963] 2 All ER 59 ***(refd)***

Johnson Medical Equipment Sdn Bhd v. Yeo Eng Lam [2011] 1 LNS 134 HC ***(refd)***

Kwong Yik Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2011] 2 CLJ 269 CA ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

A *Nihal Singh v. Bhag Singh [1976] 1 LNS 84 HC* ***(refd)***
Reeves v. Butcher [1891] 2 QB 509 ***(refd)***
Salomon v. Salomon & Co Ltd [1895-99] All ER Rep 33 ***(refd)***
Wee Tiang Teng v. Ong Chong Hooi & Anor [1978] 1 LNS 234 FC ***(refd)***

Legislation referred to:
B Limitation Act 1953, ss. 6(1), 26(2), 27(1)

For the appellant - M Menon (V Mugunthan with him); M/s Jaffar & Menon
For the respondents - Malik Imtiaz (Ronnie Yoon with him); M/s Scully Yoon

C *[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: S3-22-273-2008]*

Reported by S Barathi

D

JUDGMENT

Ramly Ali JCA:

The Appeal

E **[1]** This is an appeal against the whole decision of the learned High Court Judge, dated 22 September 2010 allowing the respondents' claim against the appellant with costs after full trial. The appellant was the second defendant at the court below.

F

The Respondents' Claim

[2] The respondents commenced an action in the High Court against the appellant and the first defendant for debt owing to them. The respondents' claim was that they had engaged the first defendant (a company where the appellant was a director at the material time) through the appellant to build a factory on a piece of land bearing the postal address of Lot 6486, No. 2 Jalan PJS 3/2 Taman Medan, Mukim Petaling off Old Klang Road, 46000 Petaling Jaya, Selangor.

G

H **[3]** The respondents claimed they had placed certain amounts of monies in the name of the first defendant to be withdrawn for progress payments for the construction of the said factory. The said factory was completed and the respondents asked for the return of the outstanding sum of RM589,055.61.

I

[4] In their statement of claim, the respondents sought the following remedies, namely:

(a) the sum of RM1,531,583.93 due and payable to the respondents as at 31 December 2007;

(b) the interest of 1% per month on the outstanding sum of RM589,055.61 as agreed compensation for the loss and/or damage suffered by the respondents from 1 January 2008 until the date of full settlement;

(c) costs on a full indemnity solicitor-client basis; and

(d) any other further orders and/or reliefs that the court deems fit and proper.

[5] The matter went for full trial before the learned High Court Judge. The respondents led evidence by calling three witnesses and the appellant by calling one witness. As against the appellant (the second defendant in the suit) judgment was entered in favour of the respondent and the appellant was ordered to pay the judgment sum of RM589,055.61 with simple interest of 1% per month.

[6] Dissatisfied with the said judgment, the appellant filed a notice of appeal. Hence the present appeal before us.

Our Findings

[7] The first issue raised by the appellant at the High Court as well as before us, was the issue of limitation under the Limitation Act 1953. The appellant contended that the cause of action first arose either on 7 July 1999 (when the factory was completed and handed over to Bryong Sdn Bhd's tenant) or on 17 December 1999 when the first defendant issued a letter together with the statement of account (as at 30 November 1999). The writ and the statement of claim in the present action was filed on 7 March 2008, ie, eight years and three months later, which clearly is outside the prescribed period of six years under s. 6(1) of the Limitation Act 1953. The six years period would have lapsed on 16 December 2005.

[8] The learned High Court Judge agreed with the respondents and found that there was an acknowledgment of debt. She relied on the short messaging service (SMS) that the appellant had sent to PW1 on 5 September 2006. The learned judge concluded that the SMS amount to a fresh acknowledgement of the debt and therefore time started to run afresh from that date (5 September 2006). Therefore the learned judge concluded that the defence of limitation as raised by the appellant does not have any merit at all.

[9] The respondents' claim against the appellant in the present action basically is based on contract which must be filed in court within the period of six years from the date of the cause of action as provided for under s. 6(1) of the Limitation Act 1953. The time begins to run from the earliest time at which the respondents (as the plaintiffs) could have brought the action (see: *Reeves v. Butcher* [1891] 2 QB 509).

[10] However, s. 26(2) of Limitation Act 1953 recognises that the right of action in cases where the debtor acknowledges the claim or make any payment in respect thereof shall be deemed to have accrued on and not before the date of the acknowledgment.

[11] Section 26(2) of the Act reads:

> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

[12] The acknowledgment in question must be in writing and duly signed by the person making it. This is clearly provided for under s. 27 of the Act, which reads:

> Formal provisions as to acknowledgments and part payments.
>
> 28 (1) Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as is referred to in section 26 or the proviso to section 16 of this Act may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[13] The respondents mentioned about the said acknowledgment in paras. 20, 21, 22 and 23 of the statement of claim where they alleged that the appellant had acknowledged as to the existence of the debt claimed by the respondents against them. Reading closely the above paragraphs in the statement of claim, we found that paras. 20 and 23 relate to oral representation allegedly made by the appellant. With respect, oral representations which are not in writing (therefore not signed by the person making it), do not amount to valid acknowledgment under s. 27(1) of the Limitation Act 1953. This is clear and well-settled.

[14] Paragraphs 21 and 22 talk about the SMS dated 5 September 2006 claimed to have been sent by the appellant to the first respondent, which reads:

> Eddy sorry to hear ur father death, regarding the loan repayment sorting soon not 2 worry now Im in UK London next week.

[15] What amounts to a valid acknowledgment of debt can be found in the *dicta* of Lord Denning MR in *Good v. Parry* [1963] 2 All ER 59, wherein His Lordship observed:

> In order to be an acknowledgement, however, the debt must be quantified in figures or at all events, it must be liquidated in this sense that it is capable of ascertainment by calculation, or by extrinsic evidence, without further agreement between the parties. For instance: "I admit I owe you the sum shown in this rent book" would be a perfectly good acknowledgement, for it only needs to be calculated. Again in *Jones v. Bellgrove Properties, Ltd* (5), the balance sheet contained the acknowledgement: "To sundry creditors 7,638s.10d". It was possible by extrinsic evidence to sort out the various items in that lump sum, and it was held to be a sufficient acknowledgement. But if the debt is not quantified and is not ascertainable without further agreement, then there is no acknowledgement sufficient to satisfy the statute.

[16] The point was made clearer by the Federal Court in *Wee Tiang Teng v. Ong Chong Hooi & Anor* [1978] 1 LNS 234; [1978] 2 MLJ 54, wherein Suffian LP said, at p. 56 (MLJ):

> … With respect we are of opinion that the letter in question was not a sufficient acknowledgement within our section 26(2). By it the defendants acknowledged that a claim had been made against them, they did not acknowledge that they were indebted to the plaintiff, and even if it was an acknowledgement the debt acknowledged was not quantified in figures nor was it capable of ascertainment by counterclaim or by extrinsic evidence without further agreement of the parties. In consolidated *Agencies Ltd v. Bertram Ltd* the Privy Council at page 482 approved the following statement of an author on the law of limitation:
>
> > To take a demand out of the statute of limitation on the ground of acknowledgement, the language of the debtor must amount to an unequivocal admission of a subsisting debt that is, subsisting at the time of its acknowledgement.

[17] In short, in order to constitute a valid acknowledgment for the purpose of s. 26(2) of the Limitation Act 1953 there must be evidence to show that there was unequivocal admission of a subsisting debt by the defendant at the time of the acknowledgment (see: *Kwong Yik Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2011] 2 CLJ 269, Court of Appeal decision).

[18] Applying the above propositions, we find that the said SMS is not an unequivocal admission of a subsisting debt as it does not quantify the so called debt in figures nor is it capable of ascertainment by calculation or by extrinsic evidence without further agreement between the parties. Further, the said SMS was ambiguous and unclear. It refers to a "loan repayment" which is not the pleaded case of the respondents. Paragraph 21 of the statement of claim clearly pleads that the said SMS was a demand made to the appellant for "the return of the monies". No mention about a "loan repayment" (as mentioned in the SMS).

[19] The said SMS is an electronic short message. It cannot be considered to be in writing and was not signed as required under s. 27(1) of the Limitation Act 1953. It may have come from the appellant's hand phone, but it does not necessarily mean that it was the appellant who actually made or wrote the message. Therefore, the requirements under s. 27 of the Limitation Act

1953 are not fulfilled; and therefore the said SMS cannot in law amount to a valid acknowledgment of the debt claimed by the respondents against the appellant for the purpose of s. 26(2) of the same Act. (see: *Nihal Singh v. Bhag Singh* [1976] 1 LNS 84; [1977] 1 MLJ 8, and *Johnson Medical Equipment Sdn Bhd v. Yeo Eng Lam* [2011] 1 LNS 134).

[20] That being the case, we find that there is no evidence of any acknowledgment of debt as alleged by the respondents. Therefore, the appellant's version that the time of the cause of action (if any) starts to run either from 7 July 1999 (when the factory was completed and handed over to Byrong Sdn Bhd) or 17 December 1999 (when the letter of the statement of account was issued by the first defendant), must be accepted. The writ and the statement of claim was only filed on 7 March 2008. The respondents' action clearly had exceeded the six year period as stipulated under s. 6(1) of the Limitation Act 1953 and therefore time barred. On this ground alone we strongly feel the respondents' claim against the appellant must fall and the appeal before us could and should be allowed.

[21] The appellant had also raised the issue that being an officer or a director of the first defendant's company the appellant (as the second defendant) cannot be held liable for the debt or liability of the first defendant.

[22] The respondents' claim against the defendants (including the appellant) in this case was based on contract or agreement whereby the respondents had engaged the service of the first defendant company to build and construct a factory on that piece of land bearing the postal address of Lot 6486, No. 2, Jalan PJS 3/2, Taman Medan, Mukim Petaling off Old Klang Road, 46000 Petaling Jaya, Selangor. The respondents then took an overdraft facility from ING Asia Private Bank Ltd Singapore to finance the construction of the factory. The respondents then converted the loan from ING (the lender) into Malaysian Ringgit and had in September 1998 deposited the total sum of RM1,310,000 into the first defendant's Fixed Deposit Accounts in RHB Berhad for the purpose of facilitating the progress payments due and payable to the first defendant in respect of the construction of the factory.

[23] As stated in the statement of claim the first defendant had by its letter in writing dated 17 December 1999 confirmed that the final amount due to the first defendant for the construction of the factory was RM480,977.17 and that the balance amount outstanding due to be refunded to the respondents after deducting the first defendant's final bill was RM589,055.61.

[24] The respondents in their statement of claim (particularly paras. 15, 18 and 20) had clearly admitted and stated that the second defendant (the appellant herein) was "lawfully acting for and on behalf of the first defendant at all material times". It was also stated in para. 2 of the statement of claim that "the second defendant (the appellant herein) is at all material times the managing director and majority shareholder of the first defendant".

[25] It is trite law that a company and its officers as well as the shareholders are separate legal entities (see: *Salomon v. Salomon & Co Ltd* [1895-99] All ER Rep 33). A company which has been validly incorporated under the law is a legal entity separate and distinct from the officers and its shareholders. It must be treated like any other independent person with rights and liabilities appropriate to itself. It can sue and be sued in its own name and being an artificial person, it can only act through its directors and officers. It enters into a contract or agreement through its directors and authorised officers. A director or an authorised officer of a company who executes an agreement or enters into contract on the company's behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or the contract itself or other documents such as a personal guarantee or letter of indemnity/undertaking, to the contrary making the directors or officers personally liable for the breaches or acts of the company.

[26] The Court of Appeal, in the case of *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437 had on the issue, made the following ruling:

> The fact that the agreement was executed by the 2nd and 3rd Respondents as Directors of Nusantara Timur does not make the 2nd and 3rd Respondents personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely Nusantara Timur's, the contracting party.

[27] In the present case, there is no evidence, either in the form of document or otherwise adduced during trial to show that the appellant had held himself out to be personally liable for the amount claimed by the respondents. The liability to refund or to repay the amount claimed by the respondents lies with the first defendant company (if at all), but not with the appellant (the second defendant) who was dealing with the respondents purely "acting for and on behalf of the first defendant at all material times" as admitted by the respondents in their statement of claim.

[28] In attaching liability to the appellant in the present case, it seems that the learned High Court Judge was trying to pierce the corporate veil and held the appellant personally liable for the actions of the first defendant company. We are of the view that in order to validly pierce the corporate veil, there must be sufficient justification or special circumstances must exist in order to do justice. The respondents (being the plaintiffs at the High Court) must lay sufficient evidential foundation to support the plea of lifting the corporate veil. (see: *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 - Court of Appeal).

[29] The Supreme Court in the case of *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 ruled that "the court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequence of lifting the veil would vary according to the circumstances of each case."

[30] In the present case fraud was never an issue that was pleaded by the respondents in their statement of claim. Also, there is no evidence of fraud ever adduced by any party during the trial. There is nothing to indicate that the first defendant company was a mere facade concealing the true fact of the transactions. Therefore, we are of the view that this is not an appropriate case for the court to lift the corporate veil and to attach liability to the appellant in relation to actions or debts by the first defendant company.

[31] The learned judge in her grounds judgment made a finding that the respondents had placed a certain amount of money in the sum of RM1,310,000 in the name of the first defendant company to be withdrawn for progress payments for the construction of the

A factory. At the end of the judgment, she concluded that "suit against D2 allowed with costs, based on RM589,055.61 with simple interest at 1% and parties to recalculate the amount of interest."

B **[32]** A perusal of the entire grounds of judgment clearly show that the learned judge did not address the issue of how the appellant was liable for the monies placed with the first defendant company in the name of the first defendant and for the purpose of progress payment payable to the first defendant. The mere fact C that the appellant had sent an SMS cannot in law constitute a legal liability on him, without any valid cause of action in law being disclosed against him.

[33] The respondents had failed to disclose and to establish a valid cause of action against the appellant. This failure is fatal to D the respondents' case against the appellant. This is another ground for the appeal before us to be allowed and the decision of the learned judge to be set aside.

Conclusions

E

[34] Based on the above considerations, we find that the learned judge was clearly wrong in entering judgment against the appellant (the second defendant at the court below). The said judgment has to be set aside. We therefore, allow the appeal with costs of F RM20,000 to the appellant. We make an order that the costs at the High Court level to be taxed, for the benefit of the appellant, and that the deposit to be refunded to the appellant.

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